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January 6, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: July 28, 2004

Case No.: TIA-0150

XXXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Applicant's illnesses were not related to his work at the DOE. The OWA accepted the Panel's determination, and the Applicant filed an Appeal with the DOE's Office of Hearings and Appeals (OHA), challenging the Panel's determination. For the following reasons, we have concluded that the appeal should be denied.

I. Background

A. The Relevant Statute and Regulations

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B established a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D established a DOE assistance program for DOE contactor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible

for this program, and its web site provides extensive information concerning the program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004). Congress added a new subpart to the Act - Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. OHA continues to process appeals until DOL commences Subpart E administration.

B. Procedural Background

The Applicant was employed as an electrical engineer and a supervisor at the Paducah Gaseous Diffusion Plant (the Plant). He worked at the Plant for approximately 36 years, from 1955 to 1991.

The Applicant filed an application with the OWA, requesting that a physician panel review his claims of Parkinson's disease and chronic bronchitis. The Applicant asserted that his illnesses were due to his exposure to toxic and hazardous materials and chemicals in the Plant buildings in which he worked. The Physician Panel rendered a negative determination with regard to both illnesses. The OWA accepted the Physician Panel's negative determinations. In his appeal, the Applicant challenges the negative determinations.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related

to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to toxic exposure at the DOE site, and state the basis for that finding. 10 C.F.R. § 852.12.

With respect to his claim for Parkinson's disease, the Applicant provides a somewhat more detailed description of the work that he believes contributed to that disease. He states that, as an electrical engineer and supervisor, he worked in every process and auxiliary building in the plant and was exposed to welding fumes. The Applicant further states that he was unaware of all the hazardous materials to which he came in contact.

The Applicant's more detailed description of his duties does not provide a basis for finding panel error. The Panel examined the records of the Plant and considered the chemicals to which the Applicant was exposed during the course of his employment. It determined that the chemicals that were part of the Plant's exposure matrix were not the source of his illnesses.

With respect to his claim for chronic bronchitis, the Applicant asserts that the Panel "implied that [he] was heavy smoker, when in fact, [he] was never a heavy smoker."¹ He contends that, at most he smoked two packs of cigarettes per day and claimed that one pack "could be classified as burned rather than smoked."² Moreover, the Applicant states that he quit smoking in 1965 and that his bronchitis persists. In support of his claim, the Applicant points to the results of pulmonary tests.

The Applicant's description of his smoking also does not provide a basis for finding panel error. In its report, the Panel accurately described the information in the medical records that noted the Applicant's smoking history. The Panel referred to a July 1985 physical examination history from Lourdes Hospital which stated that the Applicant was a "heavy smoker until 1965."³ The Panel also referenced the Plant's dispensary records which show that the Applicant complained of a cough on several different occasions, starting in November 1965. In any event, the Panel's determination did not turn on the Applicant's

¹ Applicant's Appeal Letter.

² *Id.*

³ See Record, at 62.

smoking history. The Panel found insufficient evidence to conclude that the Applicant's illnesses were related to toxic exposures. The Panel considered the chemicals with which the Applicant may have come in contact during his employment at the Plant. The Panel noted that the Applicant could have been exposed to "ammonia, hydrogen sulfide, mercury, nitrogen dioxide, phosgene and TCE."⁴ However, the Panel also noted that there were "no reports of acute exposures in the industrial medical records," and "no indication that his doctors ever attributed his bronchitis to the work environment."⁵ Accordingly, the Panel concluded that the Applicant's bronchitis was not related to toxic exposure at the DOE.

As the foregoing indicates, the appeal does not provide a basis for finding panel error and, therefore, should be denied. In compliance with Subpart E, these claims will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's denial of these claims does not purport to dispose of or in any way prejudice the Department of Labor's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0150 be, and hereby is, denied.
- (2) The denial pertains only to the DOE claim and not to the DOL's review of this claim under Subpart E.
- (3) This is a final order of the Department of Energy.

George B. Breznay
 Director
 Office of Hearings and Appeals

Date: January 6, 2005

⁴ See Panel Report, at 2 (emphasis added by Panel).

⁵ *Id.*